Supreme Court, U.S.
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No. 07-108

IN THE

Supreme Court of the United States

SALLY J. GROSS, *pro se*
Petitioner,

vs.

STATE OF NEW YORK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Respondent, New York State, can claim State Immunity, when Petitioner has shown evidentiary proof, that the Respondent's Officer has violated the Fourteenth Amendment several times in the subject case.

2. The New York State Court of Appeals reversed the Appellate Court's decision of Ricky Brown v. New York State, where DUE PROCESS was violated and stated, "The usual absolute immunity of the State is INAPPLICABLE". *Brown v. New York State, 89, N. Y. 2d at 176, 674 N.E.2d at 1131, 652 N.Y.S. 2d at 225.*

3. Section 8 of the New York State Court of Claims Act, 'Waiver of Immunity from Liability': "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals and corporations..." NOTE: The State did not say their waiver ONLY is valid in state courts.

Statement Pursuant To Rule 14.1(b)

The Names of all of the parties to the proceeding to the court whose judgment is the subject of this petition are set forth in the caption on the cover page.

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STATEMENT OF THE CASE

After approximately ten years, as a real-estate associate and real-estate broker selling luxury homes and income producing properties I opened a real-estate office, with a residential, commercial and investment department, which sold income producing properties. I managed the investment department. Over the years I had saved enough money to purchase a 60 unit apartment complex and set aside $150,000, which was the balance of my life-time savings.

I had developed a reputation of locating properties, which had a positive upside and my customers were happy, with the return on their investments. One of my ads was a 133 unit apartment complex in a very desirable neighborhood.

Albert Ancona, the owner of Oneida Furniture, stopped in to see me, with a proposal. He wanted me to purchase the 133 Unit apartment complex, with him, as partners each owning 50% of the project. His attorney drafted a Partnership Agreement, which soon was amended to a Limited Partnership Agreement, when Albert Ancona sold his two sisters each 5% of his 50% share.

We had agreed that Albert would handle the finances the first year and I would manage the apartments, then each year after we would change jobs. Also, since my projections showed $100,000 net profit, I had told Albert I would only go, into the investment, if after maintenance and repairs we would use the profits as income, as I was using my $150,000 to invest in this subject property and a second investment and I needed the income, as a cushion for my real-estate office.

Albert Ancona did not distribute the profits, as promised and said, at least for awhile we needed the funds for improvements. I was running short of funds and found a buyer for 25% of my share of the 133 unit. Albert did not want a stranger, into the investment, and brought up his brother, Leon

Ancona, from Tennessee, who lived off his oil investments. Both Albert and Leon Ancona were multimillionaires and Leon purchased the 25% of my 50% share of Alansal Realty a/k/a Majestic Apartments.

Albert and Leon Ancona were very enthusiastic, about this investment and wanted another, which showed similar possibilities.

I had another project in mind. I had spent over a year developing this 93 unit income producing property and with the balance of my life savings, the three of us, Albert, Leon and I, purchased the 93 unit, forming a General Partnership known as Arlington Mall. Albert and Leon Ancona did not pay me the $25,000 commission promised in their Brokerage Agreement (E-6)

Enough time had gone by and still Albert, who insisted he keep handling the finances, was showing a net loss of $100,000. I complained bitterly and he told me to get a loan, from his brother, Leon. Leon said he would loan me $10,000 at 18%. I agreed and he came to Syracuse to have his attorney draw up a loan agreement. (see R-85)

I am a sophisticated business woman, but in wanting to keep good relations, with my partners, I put my best judgment aside, until I engaged an auditor to look over some older books and records I was able to have my assistant collect, from Albert Ancona's home. Albert kept our Partnership books at his home, instead of at our Partnership office, as our Partnership Agreement required.

After my auditor, Irving Metz, studied our Partnership books and records he advised me to engage an attorney. The amount of funds, which both Albert Ancona and Leon Ancona had taken were outrageous. There were hundreds, upon hundreds, of checks written to Albert Ancona on a daily basis and on the backs the checks were endorsed to 'Albert and Audrey Ancona';

They were writing checks to their Bache' accounts for $5,000 a clip; Albert was ordering and shipping lumber to his furniture factory and paying them, with our Partnership checks; Leon was using our managers to find him other income properties and using our managers to manage them; They were both using Partnerhip funds to pay for supplies for their personal investments, etc. I engaged a private investigator for additional proof of their theft. (see R-143; R-144; R-145; R-146; R-147; R-148; R-149; R-167; R-168)

My attorney, Frank Ventre, wrote Albert and Leon a letter to advise them, that I wanted them to keep our investments honest. (see R-142) They completely ignored my attorney's letter and I had no other choice, but to file a law suit, against them. They, in turn, filed a counter-suit, against me, with all types of allegations, but no proof.

The attorney the Ancona Brothers used for their counter-suit, against, me was Thomas O'Bryan. Mr. O'Bryan was ultimately released, from his law office, because of the illegal way he was handling our trial (he wrote a second mortgage on our Partnership property, which was in violation of our Partnership Agreement (R-124-125) among many other violations. During one of the before trial depositions, Mr. O'Bryan was deprecating my attorney and I spoke up and said, "Mr. O'Bryan, if you disparage my attorney one more time, I will report you to the Grievance Committee." That was the start of many motions and delays, which hampered and prolonged our trial by many years.

Just before our Partnership trial (April 1996) Leon Ancona had committed suicide and just after our trial (January 1997) Albert Ancona died. Nellie Sachs, was Leon Ancona's sister, who was Executrix of his estate. Former Criminal Court Judge Lester Sachs was Nellie Sachs husband, who was friend and peer of former Criminal Court Judge John T. Buckley. Judge Buckley handled our Partnership trial. During the period of our Partnership trial Judge John T. Buckley was appointed to

the New York State Appellate Court, by Governor Pataki, against the fervent protests of the 'Center of Judicial Accountability', because of his "on-the-bench misconduct". Letters were sent to then, Governor Pataki (see E-33) and then, Attorney Eliot Spitzer (see E-36) to no avail.

Judge Buckley forced a judicial sale of our property, Arlington Mall, before repairs, which dramatically reduced the sale price, as Judge Sachs wanted a quick closing to Leon Ancona's estate. Judge Buckley held many *ex parte'* discussions, with attorney Thomas O'Bryan (see R-96-97) thus depriving me of Due Process in violation of the Fourteenth Amendment. In addition, he allowed Judge Sachs privileges in *ex parte'* conversations and conveyed my share of the proceeds of Arlington Mall to Judge Sachs and his family, which did not belong to them. (see R-123) I refused to sign the deed for the sale of Arlington Mall, which angered Judge Buckley. (see R-122, where Judge Buckley states, "It appears that all of the partners may not be willing to execute the deed conveying the title to the property to Alcurt Realty Group, Inc ..... " Judge Buckley, in retaliation, overlooked all of the Ancona Brother's theft and concocked several allegations, against me, without any viable proof.

Judge John T. Buckley totally ignored 52 of my exhibits, which showed, unequivocally, that the Ancona Brothers robbed me of my life-time savings and the earnings of over ten years, from both of our investment properties, Majestic Apartments and Arlington Mall. In addition, Judge Buckley ordered me off the properties, with no say in the management and deprived me of the monthly income, which Albert Ancona had started to distribute. This started a chain of events of losing my 60 unit apartment complex, my second Cazenovia home, my Florida condo, a building lot and put my home in jeopardy of foreclosure.

CONSTITUTIONAL RIGHTS:

Boyd v United, 116 U.S. 616 at 635 (1885)
Constitutional provisions for the security of persons and property should be liberally construed. It is the duty of the courts to be watchful for the Constitutional Rights of the citizens, and against any stealthy encroachments thereon.

Warnock v. Pecos County, 88 F3rd 341 (5th Cir. 1996)
Eleventh Amendment does not protect state officials from claims for prospective relief when it is alleged that state officials acted in violation of federal law.

CORRUPTION OF AUTHORITY:

Cannon v. Commission on Judicial Qualifications, (1975) 14 Cal. 3d 678, 694
Acts in excess of judicial authority constitutes misconduct,
678, 694
Acts in excess of judicial authority constitutes misconduct, particularly where a judge deliberately disregards the requirements of fairness and due process.

Olmstad v. United States, 377 U.S.438
"Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Owen v. City of Independence
"The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury."

U.S. v. Lee, 106 U.S. 196, 220 1 S Ct. 240, 261, 27L. Ed 171 (1882)
"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of

the government, from the highest to the lowest, are creatures of the law are bound to obey it."

Giozza v. Tierman, 148 U. S. 657, 662
"Undoubtedly it (the Fourteenth Amendment) forbids any arbitrary deprivation of life, liberty or PROPERTY, and secures equal protection to all under like circumstances in the enjoyment of their rights...and due process of law within the meaning of the(Fifth and Fourteenth) is secured.

JUDICIAL IMMUNITY:

42 USC 1983
Judges have no judicial immunity for criminal acts, aiding, siding, assisting, or conniving with others *(ex parte')* or for violating a citizen's constitutional rights.

Since the 14th Amendment to the Constitution states "NO State shall make or enforce any law which shall abridge the rights, privileges, or immunities of citizens of the United States nor deprive any citizens of life, liberty, or property, without due process of law, ... or equal protection under the law", this renders judicial immunity unconstitutional.

Pulliam v. Allen, 466 U.S. 522 (1984); 104 S. St. 1980, and 1985
In 1996, Congress passed a law to overcome the ruling which stated that judicial immunity doesn't exist; citizens can sue judges for prospective injunctive relief.

Stump v. Sparkman, id, 435 U.S. 349
Whether something a judge does should be considered a "judicial act" depends on "whether it is a function normally performed by a judge" (holding *ex parte'* discussions, with an attorney on one side, without the presence of the attorney, from the other side, thus violating due process, is not a function normally performed by a judge.)

Zeller v. Rankin, 101 S Ct. 2020, 451 U.S. 939, 68 L Ed 2d 326

When a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes expressly depriving him of jurisdiction, judicial immunity is lost.

STATEMENT OF JURISDICTION:

Howlett v. Rose, 496 U.S.356 (1990)
Federal Law and Supreme Court Cases apply to State Court Cases.
The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257, which states that writs will be issued from "final judgments and decrees rendered by the highest court of a State in which a decision could be had."

Up to this point the Respondents New York State, opposed my Claim, that New York State was responsible for the "torts of its' officers, who violated the Constitutional Rights of its' citizens stating, "absolute Judicial Immunity."

FOURTEENTH AMENDMENT

Section I: All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or PROPERTY, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

DUE PROCESS CLAUSE

The Fourteenth Amendment uses eleven words, called the Due Process Clause, to describe a legal obligation of ALL STATES. These words have as their central promise an

assurance that all levels of American government must cooperate within the law ("legality") and provide fair procedures. A series of Supreme Court decisions found that the Due Process Clause "incorporated" most of the important elements of the Bill of Rights (R-) and made them applicable to the states. If a Bill of Rights guarantee is "incorporated" in the "due process" requirement of the Fourteenth Amendment, state and federal obligations are exactly the same.

EQUAL PROTECTION OF THE LAW

The Equal Protection Clause of the US Constitution, 14th Amendment, states that no state shall "deny to any **person within its jurisdiction the equal protection of the law."**

NEW YORK COURT OF CLAIMS ACT

Article 2: To hear and determine a claim of any person ...against the state for the torts of its officers or employees while acting as such officers or employees, providing the claimant complies with the limitations of this article.

Article 4: To render judgment in favor of the claimant..., for such sum as should be paid by...the state.

Article 8: Waiver of immunity from liability
The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.

ELEVENTH AMENDMENT

Eleventh Amendment jurisprudence has become over the years esoteric and abstruse and the decisions inconsistent. At the same time, it is a vital element of federal jurisdiction that

"goes to the very heart of the federal system and affects the allocation of power between the United States and the states." Because of the centrality of the Amendment at the intersection of federal judicial power and the accountability of the States and their officers in federal constitutional standards, it has occasioned considerable dispute within and without the Court. *Chrisholm v. Georgia 2 US 419*

Aside from suits against States by the United States and by other States, there are permissible suits by individuals against States upon federal constitutional and statutory grounds and indeed upon grounds expressly covered by the Eleventh Amendment. Even so, the Fourteenth Amendment was ratified, after the Eleventh Amendment, consequently the Fourteenth Amendment takes precedence.

In the New York Court of Claims Act, Article 8, New York State waived its immunity from suit for the "torts of its officers or employees. It did not state, that it ONLY waived immunity from suit in New York State Courts.

The individual Constitutional Rights of its citizens, which *Brown 911 F. Supp at 584* noted in claims alleged by plaintiffs, included violations of Fourteenth Amendments and were brought under 42 U.S.C. 1981, 1983, 1985, 1986.

The errors of the lower courts, which affirmed the Court of Claims denial of my motion to file a claim, against New York State, unjustly ignored my unequivocal proof of the theft carried out by my business partners, Albert and Leon Ancona. They, in fact, completely ignored the fact, that Judge Buckley did not consider eight *exparte'* discussions, with Respondent's attorney, thus denying me Due Process and Equal Protection of the Law.

In addition, the lower courts, in this subject case, condoned Judge Buckley's behavior of accusing me of erroneous misconduct, without one iota of proof (see E-I) and excused the

misappropriation of the proceeds of the sale of my share of the Partnership investment property. (see E-2) The 'Center for Judicial Accountability' states Judge John T. Buckley is a known "corrupt judge". (see E 33-36)

In spite of state immunity from suits alleging constitutional torts-that is, actions for damages against the government or individual defendants for violations of a constitutional right "- the New York Court of Appeals, in *Brown v. State, 89 N. Y.2d at 176, 674 N.E.2d at 1131, 652 N.Y.S. 2d at 225,* reversed the Appellate Division and held that based on principles embodied in the State Constitution" and jurisdiction created by the Court of Claims Act, the State could be held liable for damages if its employees or officers violate a person's constitutional rights.

CONSTITUTIONAL PROVISIONS INVOLVED

Section One of the Fourteenth Amendment
that guarantees citizens equal protection
of the law states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall bridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari, as the Opinion below conflicts with the Appeal Court's previous decision, *(Brown v.* State), whereby the Court of Appeals reversed the decision of the Appellate Court, where DUE PROCESS was violated and stated, "The usual absolute immunity of the State is INAPPLICABLE."

II. This Court should grant certiorari due to the National importance, in that inconsistencies of opinions from the same court threaten the Fourteenth Amendment rights of all citizens including the Petitioner's.

III. This Court's review is warranted based on Petitioner's assertion that the Appeals Court applied different and vague rational in reaching their uniform results.

IV. For the purpose of establishing a National understanding, which would have a profound impact on America, the Court must show, whether there is a split of authority over the legal questions posed.

V. Because the lower court has produced conflicting interpretations of Constitutional or Federal law, significant questions of law must be decided by the United States Supreme Court. In this subject case, recent laws pertaining to the question of State or judicial immunity leans toward, whether a Constitutional violation has taken place.

CONCLUSION

In consideration of the foregoing, the United States Supreme Court should issue a writ of certiorari to the Court of Appeals of the State of New York and consider petitioner's argument that her right to due process and to equal protection, given to the citizens of the States, under the shield of the Fourteenth Amendment has been denied by the rulings of the courts below.

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Nellie Ancona Sachs, Executor of the Estate of Leon Ancona, decd. and for Nancy J. Finer and David R. Ancona, Personal representatives of the Estate of Albert Ancona, decd. (David A. Kalabanka, Esq., of counsel)

HODGSON, RUSS, ANDREW, WOODS and GOODYEAR, Attorneys for Sally Gross (Robert L. Weisz, Esq., of Counsel)

MARIANNE BROWN, Esq., Attorney for Defendant Karen Rosenthal.

JOHN T. BUCKLEY, J.S.C.

DECISION ORDER AND DECREE

This was a non-jury joint trial of three consolidated actions. The three actions before the court are:

1. An action by Plaintiff Leon Ancona against Defendant Sally Gross, individually and as Trustee of the Trust of Karen Rosenthal to recover a loan in the amount of $10,000 plus interest based upon a loan agreement allegedly prepared by Defendant, and relied upon by Plaintiff as correct so that Defendant allegedly is estopped from claiming its invalidity. Plaintiff also alleges unjust enrichment of the Defendant. Defendant entered a general denial, and the affirmative defenses of failure to state a cause of action, fraud, undue influence, duress, and usury, making the transaction illegal, void, and unenforceable, and accord and satisfaction.

2. An action by Plaintiff Sally Gross against Defendants Leon Ancona and Albert Ancona for breach of contract, alleging an agreement between the partners settling a prior legal action, and providing that Plaintiff would receive a one percent fee by arranging the refinancing of Arlington Mall Apartments, and a seven percent to five percent sales commission, depending upon the period of time on the market, for the sale of the

premises. Defendants entered a general denial, and the affirmative defenses of collateral estoppel and res judicata, no agreement, agreement void and unenforceable, and that Plaintiff has no capacity to sue on behalf of the trust.

3. An action by Plaintiffs Albert Ancona and Leon Ancona against Defendants Sally Gross and Karen Rosenthal (1) for a declaratory judgment that Defendant Sally Gross is not a partner in Arlington Mall Associates; or, (2) in the alternative, for a dissolution of the partnership upon either the termination of the trust, or the assignment by Karen Rosenthal of her trust interest to Sally Gross. Defendants Sally Gross and Karen Rosenthal each entered general denials, and the affirmative defenses that Defendant Sally Gross is a de facto general partner, and a counter claim that as a result of Plaintiffs' fraud, gross negligence, dishonesty, and waste each Defendant has been damaged. Also, each Defendant alleges that Plaintiffs are unreasonably withholding their consent in violation of the Partnership Agreement in not recognizing Sally Gross or Karen Rosenthal, respectively, as a general partner. And Defendant Sally Gross requests an accounting and that the court grant dissolution of the partnership. Plaintiffs Albert Ancona and Leon Ancona in their Reply to the counterclaims of Defendant Sally Gross entered a general denial and the affirmative defenses of collateral estoppel, failure to state a cause of action, and release.

The issues raised require this court to carefully consider the business interrelationship of the three partners of Arlington Mall Associates, a general partnership, during the past 20 years. Although this task at first seemed to involve many complex issues of equity and law, this Court has concluded that by applying the terms of the partnership agreement, several principles of partnership, trust and contract law and the judicial glosses thereon, four dispositive questions can be stated:

1. Is a borrowing partner estopped to assert the defense of usury when the borrowing partner intentionally misled the lending partner as to the legality of the loan, and in reliance upon this the lending partner made the usurious loan to his detriment?

2. Is a writing incomplete and not a contract when two partners understand that it is not complete until it is signed by a third partner, who never signed the writing?

3. Does a settlor and trustee of a trust who, as trustee, is a partner in a general partnership, continue as a partner when the trust terminates returning the undisposed of trust interest in the partnership to the settlor?

4. Can a court of equity, in its discretion, order the dissolution of a partnership even though sufficient grounds of dissolution were not pled in the complaint, and there was no motion made to conform the pleadings to the proof where three actions were consolidated for joint trial by consent, all parties requested dissolution of the partnership by court order, the partnership is operating at a loss, and the court found that in each action the same partner committed a breach of fiduciary duty against another partner or partners tantamount to actual fraud?

For the reasons set forth below, this court finds:

1. Sally Gross, the borrowing partner is estopped to assert the defense of usury when Sally **Gross intentionally misled Leon Ancona, the lending partner, as to the legality of the loan,** and in reliance upon this Leon Ancona made the usurious loan to his detriment.

2 The Arlington Mail Agreement (dated January 12, 1988 and February 1, 1989) is an incomplete writing and not a contract when two partners, Albert Ancona and Sally Gross, understand that it is not complete until it is signed by a third partner, Leon Ancona, who never signed the

writing.

3 Sally Gross, the settlor and trustee of the trust for Karen Rosenthal who, as trustee, is a partner of Arlington Mall Associates, continues as a partner when the trust terminates on February 2, 1989, returning the undisposed of trust interest to Sally Gross.

4. A court of equity, in its discretion, can order the dissolution of Arlington Mall Associates partnership even though sufficient grounds of dissolution were not pled in the complaint of Albert Ancona and Leon Ancona, and there was no motion made to conform the pleadings to the proof~ where three actions were consolidated for joint trial by consent, all parties requested dissolution of the partnership by court order, the partnership is operating at a loss, and the court found that in each action, the same partner, Sally Gross, committed a breach of fiduciary duty against another partner, Leon Ancona, or partners, Albert Ancona and Leon Ancona, tantamount to actual fraud.

I.

Sally Gross and Albert Ancona met in 1977. Albert Ancona called and arranged the meeting after reading a newspaper advertisement placed by Sally Gross to sell apartment property.

Sally Gross received her New York State real estate sales license in 1960 and her brokers license in 1968. Through the Syracuse University intern program, she taught law students and accounting students a three credit hour, one semester course on real estate. Sally Gross had up to' 32 real estate associates, and had an office staff that fluctuated between five and seven employees.

Her business, Gross Real Estate, had a commercial department, a residential department, an investments

department, and a financing department; and she proclaimed these specialities on her business letterhead.

When they met, Albert Ancona resided in Manlius, New York and was the owner of Oneida Furniture, a manufacturer of "contract furniture" for hotels, schools and dormitories. Albert Ancona also was the owner of two apartment complexes, namely: Overlord Apartments, with 22 apartments, in Seneca Falls, New York, and Cedar House Apartments, with 16 apartments in Canastota, New York.

In early 1978, Sally Gross and Albert Ancona formed a general partnership named Alansal Realty Company, and purchased an apartment complex known as the Majestic Apartments on James Street, Syracuse, New York, each partner having a 50 percent interest in the enterprise.

By Trust Agreement dated February 2, 1978, Sally Gross transferred her interest in Alansal Realty Company to herself as Trustee for the benefit of her daughter, Karen Rosenthal, then 19 years of age, who was named as beneficiary.

The trust instrument provides, in pertinent part:

> "1. Trust Estate.
> The Grantor, Sally Gross, hereby transfers, assigns and conveys her property interests in the Alansal Realty Company Partnership, and any and all right, title and interest in the real and personal property owned by the Alansal Realty Company, (see Schedule "A" attached hereto for a description of the real property now owned by the same partnership) to the Trustee, in Trust for Karen Rosenthal. Such property, together with any other property that may be received by the Trustee, shall constitute the trust estate.
>
> 2. Distribution of Income.
> Throughout the term of this Trust, the entire net

income derived from the
distribution from the Alansal Realty Partnership, shall be distributed to the Grantor's daughter, Karen Rosenthal, herein called the Beneficiary.
While such Beneficiary is under the age of 21 years, the Trustee shall use so much of the income of the Trust for her reasonable support, comfort and education, as the Trustee, in her discretion, deems required for those purposes. After such Beneficiary attains the age of21 years, the Trustee shall pay all the current net income of the Trust to such Beneficiary.

3. Termination of Trust.
This Trust shall terminate upon the occurrence of any of the following:

A. The passage of eleven (11) years from the date hereof."
B. The death of the Beneficiary.

Upon the termination of this Trust, the Beneficiary shall be the recipient of all the rights of the General Partner of the Alansal Realty Company; in the event that the Beneficiary is deceased at the time of the termination of this Trust, the balance of the income of this Trust shall be distributed to the estate of the Beneficiary herein, and the estate of the Beneficiary shall become the General Partner of the Alansal Realty Company Partnership."

After the purchase of the James Street property by Alansal, Albert Ancona introduced Sally Gross to his brother, Leon Ancona. Originally a resident of New Jersey, Leon Ancona moved in 1973 to Chattanooga, Tennessee, where he continued to reside until his death. Leon Ancona never resided in Central New York and was not familiar with New York State law.

After Sally Gross executed the Trust Agreement, she showed it to Albert Ancona and Leon Ancona; and Sally Gross recorded the trust agreement in the Onondaga County Clerk's Office.

Sally Gross offered to sell Leon Ancona one half of her interest in Alansal. Leon Ancona accepted the offer and agreed to purchase from Sally Gross 25 percent of the profits and losses of Alansal, as a limited partner, for $100,000.

Accordingly, an Amended Limited Partnership Agreement of Alansal dated March 22, 1978 by and between Albert Ancona and Sally Gross, as Trustee of the Trust for Karen Rosenthal, as General Partners, and Leon Ancona, and several others as Limited Partners, was executed.

Leon Ancona gave his General Power of Attorney dated and sworn to August 17, 1979 to his brother, Albert A. Ancona, which was recorded in the Onondaga County Clerk's Office on March 13, 1980. It included "real estate transactions," "banking transactions," "and all other matters." It did specifically exclude, however, "claims and litigation," "business operating transactions," and several other matters.

On September 1, 1979, Albert Ancona, Leon Ancona, and Sally Gross entered into the Arlington Mall Associates Partnership Agreement which states, in pertinent part:

The partners shall be Albert Ancona, ... Leon Ancona, ... and Sally Gross, as Trustee of the Trust for Karen Rosenthal, ... The interest of the partners in the profit of the partnership, and the interest of the partners in the losses of the partnership shall be determined on December 31st of each year, and the partners shall

share in the profit and losses equally....

9. Management of the Partnership Business. Management of the partnership business shall be vested in the partners, and each partner shall be entitled to one-third voice in the management of the partnership, and the affairs of the partnership shall be conducted in accordance with a majority vote. Each partner shall devote to the conduct of the business so much time as may be reasonably necessary for sufficient operation....

12. Dissolution of Partnership.
(a) Act of Dissolution: The following act only shall dissolve this partnership:

(1)The partnership shall be voluntarily dissolved by the unanimous written consent of all of the partners.
(b) Death, Incompetency or Bankruptcy of a partner:
The death, incompetency, or bankruptcy of any partner shall not dissolve the partnership, subject to the provisions of subparagraph (a) (1) above but the economic interest of the deceased, incompetent, or bankrupt partner shall vest in the legal representative of such partner, it being specifically understood that such legal representative shall have all rights in the management of the partnership business, and the partnership, in such event, shall continue to be managed by the successor partners.....

14. Miscellaneous Provisions.
A. No partner shall be liable to any other partner or to the partnership by reason of his actions in connection with the partnership unless otherwise so provided in this agreement, except in the case of actual fraud, gross negligence or dishonest conduct
B. Nothing herein contained shall be construed to constitute any partner the agent of another, except as provided herein. . .

C. Any controversy or claim arising out of or relating to this agreement or a breach thereof shall, upon the request of any party involved, be settled by arbitration in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon the award rendered may be entered in the highest court of any forum, state or federal, having jurisdiction.

15. Prohibited Acts. No partner may without the written consent of the other partners:
(a) Borrow money in the firm name for firm purposes or utilize collateral owned by the partnership as security for such loans....

c) Make, execute or deliver any. . . contract to sell or contract of sale of all or substantially all of the property for the partnership.
(d) Lease or mortgage any partnership real estate....

18. Entire Agreement.
A. No change or modification of this agreement shall be valid unless the same is in writing and signed by all of the parties hereto. No waiver of any provision of this agreement shall be valid unless in writing and signed by the persons against whom sought to be enforced.
B. It is expressly understood and agreed by and between all of the parties hereto that this partnership agreement sets forth all of the promises, agreements, conditions and understanding among the parties hereto with respect to the partnership and the partnership property and that there are no promises, agreements, conditions, understandings, warranties or representation, oral or written, express or implied among them, other than as herein set forth. This partnership agreement is intended by all parties hereto to be an integration of all promises, agreements, conditions and understandings among the parties with

respect to the partnership and the partnership property."

On November 2, 1979, Albert Ancona wrote a check to Weyerhauser Co. in the amount of $3,491.88 on a check of Arlington Mall Associates for materials for Arlington Mall. The check referred to Oneida Furniture Account 0081-1039 in order that Arlington Mall Associates receive a price reduction from Weyerhauser Co. for this purchase. It was a proper partnership expense of Arlington Mall Associates.

Arlington Mall Apartment complex is on 6.57 acres in the Town of Clay, Onondaga County, New York. It consists of 95 apartment units in nine separate structures, all of wood frame construction, with an adjacent swimming pool, managers office and attached 11 car garage. According to the three partners, they purchased this premises for either $1.5 million (Albert Ancona and Leon Ancona), or $2.15 million (Sally Gross). A memo dated January 2, 1980 entitled "Arlington Mall Apts. Cash Contributions" lists a purchase price of $1,286,346.99. The deed to the partners dated January 17, 1980 recorded on March 13, 1980 indicates consideration in the sum of $100,000 plus an assumption of mortgage of $800,000 for a total consideration of $900,000.

The fair market value of the premises in the first quarter of 1996 was appraised at $1.5 million (for Albert Ancona and Leon Ancona), and at $900,000 (for Sally Gross).

The same memo shows that each partner invested $50,000 and also loaned the partnership $20,287.46. These loans have been repaid to the partners.

Initially, the management of Arlington Mall Associates was divided, with Albert Ancona handling the finances, Leon Ancona responsible for construction and repairs, and Sally Gross, as Trustee, taking care of tenants and personnel. Albert

Ancona continued to handle the finances until he moved to Florida in 1990. From 1990 until his death in 1993, Leon Ancona handled the finances, visiting Arlington Mall every six weeks or so. During this partnership, neither Albert Ancona nor Leon Ancona ever made a partnership distribution to themselves without making a partnership distribution to Sally Gross in an amount commensurate with her partnership interest.

Prior to October 21, 1980, Sally Gross called Leon Ancona by telephone in Chattanooga, Tennessee and told Leon Ancona that she needed to borrow $10,000. Sally Gross asked Leon Ancona if he would loan her the money, offering to pay Leon Ancona 18% per annum interest on the loan, and to give Leon Ancona as security, a 2% interest in Arlington Mall Associates to be held in escrow until she repaid the loan.

Leon Ancona agreed to loan Sally Gross the $10,000. Accordingly, Sally Gross drafted the loan agreement and set the financial terms. Leon Ancona and Sally Gross, as Trustee, signed the Loan Agreement dated October 21, 1980, which also provided that payments of interest only be paid in quarterly intervals, with all principal and interest due one year from the receipt of the loan by the borrower. Then Leon Ancona delivered to Sally Gross the $10,000 as a loan.

At this time, Sally Gross and Leon Ancona were partners in both Alansal Realty Company and Arlington Mall Associates. Leon Ancona knew his partner, Sally Gross, to be a licensed real estate broker with a specialty in refinancing, who refinanced the Canada Life mortgage in the Arlington Mall Associates closing. As one active in borrowing and lending, she was familiar with usury laws. Sally Gross was aware of the legal rate and didn't reveal it to Leon Ancona. Sally Gross knew the interest rate was usurious, but Leon Ancona did not know this. In making the loan, Leon Ancona relied on Sally Gross, and she intentionally misled Leon Ancona as to the legality of the loan. In reliance upon this, Leon Ancona made

the loan to Sally Gross to his financial detriment.

On or about January 1, 1981, Albert Ancona and Leon Ancona each purchased from Sally Gross an additional 4 1/6% of Arlington Mall Associates, for which Albert Ancona and Leon Ancona each paid $14,708.34. Accordingly, an Amendment dated January 1, 1981 to the Arlington Mall Associates Partnership Agreement was executed to show that the capital contribution of Sally Gross as Trustee was reduced to $37,500.00 while the capital contribution of Albert Ancona and Leon Ancona each was increased to $56,200.00; and the partners share in the gain and loss were changed to show a reduction for Sally Gross, as Trustee, to *25%*, and an increase for Albert Ancona and Leon Ancona to 37 1/2% for each.

For the first several years of the partnership (1979-1985) there were no distributions to partners since the earnings were used for needed repairs and renovations. Sally Gross was dissatisfied with this arrangement. She complained to her partners that she wanted monthly distributions made to partners. There is no provision in the Partnership Agreement requiring monthly distributions.

By letter dated March 26, 1984, Leon Ancona wrote Sally Gross stating:

> "I lent you the $10,000 on Oct. 21, 1980 which was due and payable in one year and it is now the end of March 1984.
>
> There has been no interest paid since October 25, 1982 which is 1 year and 5 months. You now owe me over $5,100 in back interest payments and it is time to <u>call a halt!</u>
>
> You keep on stalling me with your refinancing but that has been going on for over a year and a half.
> I want my money or transfer the two percent stock in

Arlington for the principal and pay the interest."

Sally Gross made no payments of principal on this debt. She never transferred any interest in Arlington Mall Associates to satisfy or reduce the principal of this debt; and she made no payments of interest on this debt after October *25,* 1982. As of March 26, 1984, Sally Gross had paid $1,059.60 interest to Leon Ancona on this debt, and owed $5,100.00 based on an interest rate of 18% per annum.

In 1985, Albert Ancona wrote Arlington Mall checks for a roofing project at Arlington Mall to Georgia Pacific, Champion, and Gerber Bed Company, making reference to Oneida Furniture to receive a price reduction for the lumber. This was a proper partnership expense of Arlington Mall Associates.

In January, 1986, Sally Gross took possession of the partnership books and records, including check books, check registers, and canceled checks; and she made several partnership distributions to herself from Arlington Mall Associates without making distributions to her partners, Albert Ancona and Leon Ancona, and without their knowledge or consent. These included two checks each in the amount of $1,950 and dated August 27, 1986 which she drew from the Arlington Mail account with Marine Midland Bank, and which she then deposited in an account she opened, without the knowledge or consent of her partners, in Onondaga Savings Bank, entitled "Arlington Mall Apt. Special," and thereafter wrote checks to herself and for her own purposes. As soon as these canceled Marine Midland checks on the Arlington Mall Account were returned to Albert Ancona, he and Leon Ancona learned what Sally had done without consulting them, and she lost their trust and confidence. Sally Gross, in turn, complained that Albert Ancona and Leon Ancona removed the books of account from the partnership principal office and excluded her from the management of the partnership.

On January 16, 1987, Albert Ancona and Leon Ancona served on Sally Gross, as Trustee, a notice of demand for arbitration.

Thereafter, on or about February 7, 1987, Sally Gross, as Trustee, commenced an action, against Defendants Leon Ancona and Albert Ancona for an accounting alleging among other things, that the Defendants have committed "gross negligence, fraud, dishonesty and other improper conduct toward the Plaintiff and with regard to the partnerships," i.e. Arlington Mall Associates and Alansal Realty Company; and the complaint also alleged sixteen general categories of improper conduct by the Defendants as partners. The complaint demanded, among other things, damages in the sum of one million dollars, that a receiver by appointed, that Plaintiff be paid a management fee, and also be paid for services she rended to the partnership.

Thereafter, on application of Albert Ancona, a temporary injunction was granted, enjoining Sally Gross from certain acts. Then on February 9, 1988, it was ordered that: rents of Alansal be collected, and immediately deposited in a partnership account; that withdrawals from any Alansal accounts be made only on the joint signatures of the general partners, and only to pay partnership expenses and bills; that no partner shall unreasonably refuse to sign any check for payment of such expense; that no partner will interfere with the regular and routine duties of the partnership employees at the Majestic Apartments; and that Sally Gross:

> "shall return all books and records of the partnership in her possession to the partnership offices at the Majestic Apartments, said books and records to remain therein for inspection by the general partners."

Thereafter, on October 22, 1987, an Amended Trust Agreement by Sally Gross as Grantor and Trustee amending the Trust dated February 2, 1978 was executed, and recorded in the Onondaga County Clerk's Office. This Amended Trust

Agreement purported to authorize Sally Gross to convey all property interests in Alansal Realty Company to Sally Gross, individually, and it conveyed all other trust property (i.e. the trust interest in Arlington Mall Associates) to Sally Gross, individually. Thereafter, a Consent to Amend Trust of Karen Rosenthal was executed on October 26, 1987, but was not recorded in the Onondaga County Clerk's Office.

In 1988, while the prior litigation was pending, Sally Gross initiated discussions with Albert Ancona and with Leon Ancona, proposing that the partners resolve their differences regarding the two partnerships. Sally Gross proposed that the realty in each partnership be refinanced with her receiving a 1% refinancing commission, and then be offered for sale with her receiving an exclusive listing for two years, and a sales commission. In return, Sally Gross would execute and deliver to Albert Ancona and Leon Ancona a general release, and a stipulation of discontinuance of the pending law suit. Also, Albert Ancona and Leon Ancona would withdraw the claims in arbitration and would provide general releases to Sally Gross.

Albert Ancona agreed, but Leon Ancona was opposed. Sally Gross asked Albert Ancona to speak to Leon Ancona to convince him to reconsider and agree to the proposal. Albert Ancona, however, told Sally Gross that he would not agree to talk to Leon Ancona, and he suggested that she talk to Leon Ancona herself Albert Ancona never indicated to Sally Gross that he had any authority to act in behalf of Leon Ancona. Albert Ancona told Sally Gross that it was necessary for Leon Ancona to sign the agreement for it to be effective. Albert Ancona said to Sally Gross, "It's your sale. You should sell it to him yourself."

Sally Gross drafted and prepared two written agreements, one for the sale of Alansal realty, and the other for the sale of Arlington Mail realty, each agreement substantially the same, containing her proposals for the refinancing, and sale of the

respective realty, and the other terms of settlement.

The proposed Alansal Agreement had signature lines for each of the two (2) general partners, Sally Gross as Trustee, and Albert Ancona. The proposed Arlington Mall Agreement had signature lines for each of the three (3) general partners, Sally Gross, as Trustee, Albert Ancona, and Leon Ancona.

When Sally Gross personally delivered the two proposed agreements to Albert Ancona, on January 12, 1988, and while she waited, he signed only his own signature to each agreement, dated each and personally handed back to Sally Gross both of the signed agreements.

Sally Gross, as Trustee, signed the Alansal Agreement on January 23, 1988 which she forwarded to Albert Ancona together with her General Release running to Albert Ancona and Leon Ancona, dated, signed and acknowledged the same day. Thereafter, the Alansal Realty was refinanced, sold, and the commissions were paid to Sally Gross in accordance with the Alansal Agreement

Thereafter, by Order dated June 20, 1988, in the prior litigation, the court:

> "ORDERED, that the relief sought in the Defendants' motion be and the same hereby is in all respects modified and this action by Sally Gross as Plaintiff is hereby dismissed with prejudice; and it is further ORDERED, that the parties shall proceed to resolve their differences pursuant to the terms of their partnership agreements and shall proceed to arbitrate the same."
>
> A letter opinion attached to this Order states, in part:
>
> "In the opinion of this court, and from a plain reading of the arbitration clauses in question, the Plaintiffs

> action against the Defendants should be dismissed - and not stayed - with the parties resolving their alleged differences as called for in the partnership agreements . . . by arbitration. . . Thus, this court is of the opinion that the arbitration clauses are binding on the parties as to resolution of their dispute and that the Plaintiffs action should not be maintained. As such, this court awards to the Defendants the relief of summary judgment to dismiss the Plaintiffs action and awards to the Plaintiff the relief that the matters in contention between these parties proceed - and be determined by - arbitration."

There was no appeal from this order and no arbitration proceedings were held. Thereafter, on February 1, 1989, Sally Gross, as Trustee, signed the Arlington Agreement, and she excised, by cutting from the agreement with scissors, the bottom signature line for Leon Ancona's signature, the printed legend under the signature line, "Leon Ancona, General Partner," and the date line with the legend, "Date," to the left of and parallel to the signature line.

This transparent, futile act on the part of Sally Gross only emphasized the obvious: when Albert Ancona signed the Arlington Mall Agreement, he and Sally Gross both intended that the Agreement be effective only if signed by all three partners, including Leon Ancona. This agreement, however, was never agreed to by Leon Ancona, nor was it ever signed or agreed to by Albert Ancona as agent for Leon Ancona. Albert Ancona never gave Sally Gross any reason to believe he .was acting for Leon Ancona to authorize the sale of Arlington Mall. In fact, Albert Ancona knew that Leon Ancona's present intentions were to the contrary. Leon Ancona had told Albert Ancona that he did not want to pay Sally Gross a commission for refinancing and that he did not want to sell Arlington Mall. This is consistent with the inference raised by paragraph 14B of the 'Partnership Agreement that a partner is not acting as agent of another partner in instances

such as this, and with the specific exclusion of "claims and litigation" from Leon Ancona's General Power I of Attorney to Albert Ancona.

On the next day, February 2, 1989, the Trust dated February 2, 1978 made by Sally Gross terminated by "the passage of eleven (11) years from the date thereof."

In about 1988-1989, Sally Gross claimed one of the cabinets in the Arlington Mall office as her filing cabinet. She advised George Weaver, and Bob Harding, employees of the partnership, that she "had stuff in there that did not belong to the office" and she "was going to put a lock on it." Sally Gross told Bob Harding in George Weaver's presence that she "did not want anybody in that cabinet." Then, within a week, when George Weaver moved the cabinet from Bob Harding's apartment to the nearby bathroom, George Weaver saw that a lock was securing the cabinet. There was no key for this lock in the office. The locked cabinet was of light weight when George moved it into the bathroom. Several times. thereafter, George saw Sally Gross enter the bathroom and she 'had sufficient opportunity to fill the cabinet with the partnership records. Sally Gross had placed books and records of Arlington Mail Associates, including check registers and canceled checks, in 'this cabinet.

During the period from 1990-93 when Leon Ancona was actively managing Arlington Mall, 'on his visits there, he stayed in a room in the manager's apartment at no personal expense, used the I partnership truck, made long distance calls on partnership business, and called home to Tennessee, without reimbursing the partnership. This was a proper partnership expense under the circumstances.

By letter dated October 12, 1990 to Albert Ancona, then a resident of Lakeworth, Florida, and to Leon Ancona, Sally Gross stated, in part:

"I have been advised to write you about the balloon payment, which will be due on Arlington Mall in June 1991.As you know, we had a written agreement, which stated that I would drop my law suit on the condition that I would re-finance and sell Arlington Mall. Since you have hindered the re-finance and sale, which would have paid off the balloon payment, you will have to be responsible for seeing that the balloon payment is paid. If a foreclosure is commenced by the mortgagee, then you would be responsible for any losses."

In 1991, Sally Gross commenced an action against Leon Ancona and Albert Ancona for breach of contract alleging the violation of an agreement between the partners regarding the refinancing and sale of Arlington Mall Associates (Action No. 2).

On or about October 1, 1991, Alan Ancona and Leon Ancona, using their own personal funds and not partnership money, paid off the balloon mortgage payment of the Arlington Mall Associates to Bronstein-Glover Associates. To secure this additional personal investment in the partnership in the amount of the mortgage pay off and the necessary expenses, Albert Ancona and Leon Ancona executed a note and mortgage to themselves on behalf of the partnership, thus obligating Arlington Mall Associates as mortgagor to themselves personally as mortgagees in the amount of $124,279.86 ,the mortgage providing for interest at the rate of 12% per annum with the payment of equal monthly installments of $2,036.50 commencing November 1, 1991 and continuing until October 1, 1999 when the remaining principal payments shall be due and payable.

The written invitation by Sally Gross inviting Albert Ancona and Leon Ancona to use their own funds the balloon mortgage payment served as an implied waiver and consent of Sally Gross authorizing Albert Ancona and Leon Ancona to prepare

and execute the note and mortgage to secure the loan of Albert Ancona and Leon Ancona to the partnership to pay off the l balloon mortgage payment and any necessary expenses involved in the pay-off and the note and mortgage including reasonable attorneys fees. (See paragraph 15 (a) and (d) of Partnership Agreement.)

On December 23, 1991, Karen P. Rosenthal executed and acknowledged an assignment of trust interest from herself to Sally Gross, including "all of the rights of assignor as general partner of the Alansal Realty Company and Arlington Mall Associates, ..."

In April, 1992 when the Arlington Mall front office was made into a small apartment for Leon Ancona, George Weaver moved the locked cabinet from the bathroom to Leon's apartment. At this time, there continued to be no key in the office to this lock. When George Weaver moved the locked cabinet from the bathroom to Leon's apartment, George noticed that the locked cabinet was then much heavier than when he had moved the cabinet into the bathroom in 1988-89.

In 1993, Sally Gross wrote several more checks from an Arlington Mall Associate's account providing partnership distributions for herself without paying partnership distributions to Albert Ancona and Leon Ancona, and without their knowledge or consent, namely: a check dated July 27, 1993, and a check dated August 16, 1993, each in the amount of $1,995.

Thereafter, in 1993, Albert Ancona and Leon Ancona brought an action against Sally Gross and Karen Rosenthal for declaratory judgment that Sally Gross is not a partner in Arlington Mall Associates or in the alternative for dissolution of the partnership (Action No. 3). Defendants Sally Gross and Karen Rosenthal entered general denials, affirmative defenses that Sally Gross is a *de facto* partner, and counterclaims for damages based upon plaintiffs fraud, gross negligence, and

dishonesty. And defendant Sally Gross requests that the court grant dissolution of the partnership.

Leon Ancona died on October 29, 1993. After Leon's death, Albert Ancona did not feel well enough to take over again the management of the Arlington Mall Apartments. He was ill with Parkinson's disease which caused him to be unsteady, and have difficulty walking and speaking. Also, he did not trust Sally Gross to manage the apartments. For these reasons, he turned over the management of the Arlington Mall Apartments to Langley-Jones Associates, who have managed the Arlington Mall Associates to the present time. Since this time, there have been no partnership distributions or profits. Instead, this money goes to pay the management fees of Langley-Jones Associates, and the partnership is operating at a loss.

On November 3, 1993, this Court ordered that Sally Gross, the defendant, her agents, servants, employees and attorneys are hereby enjoined and restrained during the pendency of this I action from participating in the management of the affairs of the Arlington Mall Associates Partnership and she shall be further restrained and enjoined from writing any checks on the account located at Chase Lincoln First Bank, NA. with account number 110048356."

This restraining order continues to the present time.

By letter dated November 5, 1993, Sally Gross wrote to Albert Ancona and Leon Ancona, in care of their attorneys, requesting that they "consent to my acting as general partner in the Arlington Mall partnership..."

In the course of the pre-trial discovery in this case, Sally Gross demanded that Albert Ancona and Leon Ancona produce all of the books and records of the partnership including check registers and canceled checks. At the request of Sally Gross, this court ordered Albert Ancona and I Leon Ancona to produce these books and records, but they were unable to

produce some of the records which were missing.

During the trial of this action, on April 17, 1996, at the office of the Arlington Mall Associates in the presence of Nellie Ancona Sachs, her husband Lester Sachs, and Attorney Thomas O'Bryan, George Weaver, an employee of Arlington Mall Associates, broke open the lock on the filing cabinet which had been locked by Sally Gross, and found the missing records of Arlington Mall Associates including check registers and canceled checks from the year 1979-81 and 1985. These records had been knowingly secreted in this filing cabinet by Sally Gross and secured there under her lock and key. Made bold by the knowledge of the presence of these records in the locked filing cabinet, Sally Gross demanded that Albert Ancona and Leon Ancona produce these records, and even obtained a court order for their production, knowing full-well that she herself had made these records unavailable and nearly impossible to produce.

Albert Ancona died on January 12, 1997.

Throughout this partnership, Albert Ancona and Leon Ancona have acted honestly, responsibly, and in good faith in their partnership dealings with Sally Gross.

A trustee may be a general partner in a partnership. *Matter of Glaser,* 19 AD2d 354 (1st Dept. 1963) The intention of the parties is one of the tests in determining whether a partnership exists *Kyle* v. *Ford,* 184 AD2d 1036 (4th Dept. 1992). Here, a partnership exists. *Martin v. Peyton,* 246 NY 213 (1927).

The Partnership law set forth the rules regarding the right and duties of partners, subject to any agreement between them. *In re Wilkind's Estate,* 167 Misc. 885 (1938). The terms of the of the Partnership Law are not intended to override an agreement, whether expressed in words or implied in fact. The partnership agreement controls. *Lanier v. Bowdoin,* 284 N.Y.

32 (1938); and *Silverman v. Caplin,* 150 AD2d 673 (2nd Dept. 1989). The court cannot rewrite a partnership agreement. *Heritage v. La Valle,* 199 AD2d 1036 (4th Dept. 1993).

Chief Justice Cardozo expressed clearly the fiduciary duty of copartners in *Meinhard v. Salmon,* 249 N.Y. 458 (1928), at pp. 463-4:

> " ...Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions (*Wendt v. Fischer,* 243 N.Y. 439, 444). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court...."

More than 60 years later in *Birnbaum v. Birnbaum,* 73 NY2d 461 (1989), the fiduciary duty of a partner was reiterated at p. 466:

> ".....it is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect (e.g., *Meinhard v. Salmon,* supra, at 463-464; *Matter of Rothko,* 43 NY2d 305, 319). This is a sensitive and "inflexible" rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of

> those owed a fiduciary duty *(Matter of Ryan,* 291 NY 376, 407)...." See also *Alizio v. Alizio,* 176 AD2d 279 (2nd Dept. 1991).

The general rule is that partners cannot sue each other at law for anything relating to the partnership unless there has been an adjustment, settlement, or balance struck and a promise to pay. *Silverman v. Caplin,* supra; *Arnold v. Arnold,* 90 N.Y. 500 (1882); *Lordv. Hull,* 178 N.Y. 9(1904). *Banker's Trust Co. v. Dennis 256* AD 495 (1st Dept. 1939), *affd.* 282 NY 635 (1940). So that no complex accounting is required Miske *v. Berdon,* 189 AD2d 594 (1st Dept. 1993); and so that only one fully closed transaction is involved. *Giblin v. Anesthesiology Assoc.,* 171 AD2d 839 (2nd Dept. 1991).

However, a partner may sue another partner at law on claims growing out of transactions not connected with the partnership. *Burnstein v. Geist,* 257 AD 792 (1st Dept. 1939); and *Pearson v. Pearson,* 40 AD2d 666 (1st Dept. 1973).

Also, a partner may sue another partner at law on claims growing out of certain transactions connected with the partnership if the claim can be determined without going into the partnership accounts. In *Crater v. Bininger,* 45 NY 545 (1871), at pp. 547-549, the Court of Appeals held:

> "....The note was not a partnership note; it was not given by or to the firm. It was given by one member of the partnership to another, upon a good consideration, and an action upon it did not involve an examination of the partnership accounts.. . There is no rule forbidding one partner to sue another at law in respect of a debt arising out of a partnership transaction. If the obligation or contract, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts, an action will lie by one partner against his

copartner. *(Warrall v. Grayson* 1 M. & W., 166). The advance of the money upon the security of the note in suit for a special purpose connected with the partnership business was separate and distinct from the general partnership dealings, and an action upon it does not involve an examination of the partnership accounts. It was an independent transaction between two of several partners, and the contract is valid and may be enforced at law. The judgment should be affirmed."

See also *Bank of British North American v. Delafield,* 126 NY 410 (1891); and *Katz v. Powers,* 97 Misc2d 892 (1978). On the other hand, if one partner has breached a fiduciary duty owed to his other partners; the offending partner may be held to account in an action in equity. *Parnes vs. Edelman,* 128 AD2d 596 (2nd Dept. 1987).

B.

In this case, the action to recover a loan is a valid action at law. *Crater v. Bininger,* supra; and *Bank of North America v. Delafield,* supra. The loan of $10,000 is evidenced by the Loan Agreement dated October 21, 1980 providing for the payment of 18% interest per annum in quarterly payments of interest only with all principal and interest due one year from the receipt of the loan by the borrower. The defense of usury has been raised by Defendant Sally Gross, the borrowing partner. The usury statute prohibits any person from, directly or indirectly, charging interest on a loan or forbearance of any money at a rate exceeding that established by law **(General Obligations Law § 5-501 [21)**.

The Loan Agreement is usurious on its face given the fact that the legal rate of interest on the date of its execution was 11%. (See Historical Note, McKinney's Consolidated Laws of New York, Book 29A, General Obligations Law, p. 185, Section 4.1 Interest Rate); *Clark v. Daby,* 639 NYS2d 549 (3rd Dept. 1996); *Giventer v. Arnow,* 37 NY^2 305 (1975); *Fareri v. Rain's*

International Ltd , 187 AD2d 481 (2nd Dept. 1992); and *Matter of Dane,* 55 AD2d 224 (3rd Dept. 1976).

The Plaintiff Estate of Leon Ancona raises the doctrine of estoppel in pais, or equitable estoppel, which is based on .the maxim that no man may take advantage of his own wrong... *General Stencils v Chiappa,* 18 NY2d 125 (1966). This principal can be applied to usury cases involving partners. Partnership **Law** § 4 (2). The borrower, Defendant Sally Gross, who because of her fiduciary relationship with her partner, Leon Ancona, was under a duty to speak, and who failed to disclose the illegality of the rate of interest she proposed, is estopped from asserting the defense of usury where the lender rightfully relied on the borrower to his detriment in making the loan. *Seidel v. 18 E. 17th St. Owners,* 79 NY2d 735 (1992), *Abramovitz v. Kew Realty Equities Inc.,* 180 AD2d *568* (1st Dept. 1992); *Angelo v. Brenner,* 90 AD2d 131 (3rd Dept. 1982); *Hammond v. Marrano,* 88 AD2d 758 (4th Dept. 1982); and *Schaaf* V. *Borsher,* 82 AD2d 880 (2nd Dept. 1980).

This court determines that judgment should be entered in this action in favor of the Plaintiff Estate of Leon Ancona for the principal amount of the loan from October 21, 1980 together with the legal rate of interest (11%) per annum to the date of entry of the judgment, less $1,059.60 interest paid.

C.

The action for breach of contract in this case can be determined without going into the partnership accounts. *Crater v. Bininger,* supra, and is, therefore a valid action at law.

There was no Agreement. Both Albert Ancona and Sally Gross knew and understood that the writing was not to ripen

into a contract until it was signed by Leon Ancona. *Application of Garret Corp,* 16 Misc2d 152 (1959), *affd* 9AD2d 741 (1st Dept. 1958), *affd.* 8 NY2d 819 (1960). The law does not regard an arrangement as complete which the parties regard as incomplete. *Kusky v. Berger,* 33 Misc2d 564 (1962), *affd.* 20 AD2d 851 (2nd Dept. 1964). Albert Ancona signed with the understanding that there would be no agreement unless Leon Ancona also signed the Agreement; and Leon Ancona never signed this Agreement.

Albert Ancona and Sally Gross, as trustee, each signed the Agreement to refinance and offer for sale all of the realty of the Arlington Mall Partnership, they having a majority interest in the partnership (62 ½%). Intentions aside, this Agreement is unenforceable. It is a prohibited act under Paragraph 15(c) of the Partnership Agreement since Leon Ancona, the other partner, gave no written consent for this "contract to sell or contract of sale of all or substantially all of the property for the partnership."

This Court determines that judgment should be entered in this action in favor of Defendants Estates of Albert Ancona and Leon Ancona and against Plaintiff Sally Gross finding no cause of action in favor of the Defendants.

D.

The action in this case for a declaratory judgment or a dissolution can be determined without going into the partnership accounts and so is a valid action at law. *Crater v. Bininger,* supra. The counterclaim for fraud, gross negligence, and dishonesty alleges a breach of fiduciary duty and sounds in equity. *Parnes v. Edelman,* supra. Both the action and the counterclaim are properly before this court.

The Court's file did not contain the Reply of the plaintiffs, the Estates of Albert Ancona and Leon Ancona, deceased, a responsive pleading to the counterclaims of the Defendant

Sally Gross and Defendant Karen Rosenthal. On or about May 28, 1997 the Court, through its law clerk, contacted the attorneys for each of the parties asking to be supplied with a copy of the replies. In response, Thomas E. O'Bryan, an attorney for the plaintiffs, on notice to the Defendant, delivered a Reply to the counterclaim dated June 3, 1997, an affidavit of Thomas E. O'Bryan, sworn to June 3, 1997, and an affidavit of service of the reply and the O'Bryan affidavit upon the attorneys for each Defendant.

Mr. OBryan's affidavit states, in substance, as follows: that he received the amended verified answer of Defendant Sally Gross on May 31, 1994 and prepared an answer (reply) to Defendant's counterclaim on June 1, 1994 and the reply was forwarded to James Burns, Esq., the attorney at the time for Sally Gross; that he is unable to find in his file a copy of the reply, but that the enclosed reply containing a general denial and the affirmative defenses of collateral estoppel, failure to state a cause of action, and release, is a true and correct copy of the reply submitted to the defendants on or about June 1, 1994; that in the three years of discovery and litigation, Sally Gross, through her attorneys, both Mr. Burns and her present attorney, Richard Weisz, Esq., has never raised the issue that a reply was never submitted, and that Plaintiff was in default; that during the trial held in April and May, 1996, most of the trial focused on Sally Gross' efforts to prove her counterclaims; that Plaintiffs offered proof to refute the allegations of the counterclaims, and to prove the affirmative defenses of res judicata, collateral estoppel and release against the counterclaims; that Defendant Sally Gross never objected to any proof put forward as to these defenses on the ground that these defenses were never raised in a pleading; and that there is no surprise or prejudice to the Defendant Sally Gross in submitting the enclosed reply at this time.

In response, Richard L. Weisz, attorney for Defendant Sally Gross delivered to the Court a letter dated June 5, 1997, which opposes the inclusion in the record of Mr. O'Bryan's proposed

reply at the present time. Mr. Weisz states that he has reviewed all of the pleadings in the file from Jim Burns' office and did not find any Reply in those papers, even though he found copies of all the other pleadings. Mr. Weisz submits that the Court's decision should be on the record as it exists and not on "new" material being submitted.

Mr. Weisz does not say the Reply was not served on Mr. Burns, the attorney for

Defendant Sally Gross when pleadings.were exchanged by the parties. Mr. Weisz does not allege and does not offer any proof that Defendant Sally Gross would be prejudiced or surprised by the Court's acceptance of the Reply. Mr. Weisz does not controvert any material allegation made by Mr. O'Bryan.

Having presided over the trial of these three actions and having thoroughly reviewed the transcripts of testimony and the exhibits received in evidence, this Court finds that the Reply to the counterclaims was served in timely manner by Plaintiffs, and that the Reply dated June 3, 1997 is a true and correct copy of the Reply served upon Defendant Sally Gross on or about June 1, 1994; that there is no prejudice to Defendant Sally Gross; that the Plaintiffs have a meritorious defense to the counterclaims of Defendant Sally Gross; that the Plaintiffs have acted in~.good faith in this matter; and, that considering the complexity of this litigation, the disappearance of khe original Reply is of no great moment considering that all parties litigated this action as if the Reply with affirmative defenses was in this Court's file. At trial, the parties submitted proof on these affirmative defenses and there was no objection at that time that affirmative defenses had not been properly pled. Therefore, this Court substitutes the Reply dated June 3, 1997 for the original Reply served upon Defendant Sally Gross on or about June 1, 1994. **CPLR § 3018(b),** §3012(d), § 2001. See also *Darling v City of Niagara Falls,* 69 AD2d 989 (4th Dept. 1979) *affirmed* 49 NY2d 855 (1980).

The Trust Agreement dated February 2, 1978 and recorded in the Onondaga County Clerk's Office was not amended since no consent to amend the trust by Karen Rosenthal, the beneficiary, was recorded. **Estates, Powers, and Trust Law § 7-1.9(a).** Therefore the trust agreement terminated "... upon ... the passage of eleven (11) years from the date thereof ", on February 2, 1989. **General Construction Law §§ 20** and 58; *Silverstein v. Lehrfeld,* 181 Misc. 291 (1943).

By the terms of the trust after Karen Rosenthal, the beneficiary "... attains the age of21 years, the Trustee shall pay all the current net income of the trust to such Beneficiary . ." So, from 1980 when she became 21 years of age until February 2, 1989, when the trust terminated, Karen Rosenthal was entitled to receive the current net income of the trust. Once the trust terminated, the trust instrument left undisposed of, the principal and interest of the trust, except for the Alansal Realty Company. Thus, the trust's *25%* interest in Arlington Mall Associates was left undisposed of.

There is a presumption that a settlor did not intend to leave an interest in a trust undisposed of *In re Cowles Will,* 22 AD2d 365 (1st Dept. 1965), *affd* 17 NY2d 567 (1966); *Matter of Revson,* 86 AD2d 872 (2nd Dept. 1982).

Section 7-1.7 of **The Estates, Powers and Trusts Law** states: "Every legal estate and interest not embraced in an express trust and not otherwise disposed of remains in the creator."

The Practice Commentaries in McKmnney's Consolidated Laws of New York Annotated Book 38, **Partnership Law,** on this section states, in part: "Whenever a creator of a trust fails to dispose of an interest in property, it remains in him."

See *Livingston v. Ward,* 247 NY 97 (1928); *Doctor v. Hughes,* 225 NY 305 (1919); and *Nearpass v. Newman,* 106 NY47 (1887). See also Scott **on Trusts,** §§ 345.3 and 430.1.

Pursuant to Section 7-1.7 of the Estates, **Powers and Trusts Law,** therefore, when this trust terminated on February 2, 1989 the undisposed of interest of 25% of Arlington Mall Associates remained in the settlor, Sally Gross; and she continued as a partner in Arlington Mall Associates, but as an individual rather than as a trustee. *Matter of Glaser,* supra. *Pross v. Jadam Equities Ltd et. al.,* 134 AD2d 154 (1st Dept. 1987). Therefore, the request of Plaintiffs, the Estates of Albert Ancona and Leon Ancona, for a judgment declaring that Defendant Sally Gross is not a partner of Arlington Mall Associates is denied.

Both Plaintiffs, the Estates of Albert Ancona and Leon Ancona on the one hand, and Defendant Sally Gross, on the other hand, have requested dissolution of the partnership by decree of court pursuant to § 63 of the Partnership **Law.**

Paragraph I 4C of the Partnership Agreement effectively limits partnership disputes~ to arbitration ". . . upon the request of any party involved.. ." Partners may, by agreement, limit their disputes to be determined by arbitration rather than by the courts. *Matter of Trump,* 194 AD2d 70 (1st Dept. *1993);Matter of Marks,* 171 AD2d 665 (2nd Dept. 1991); *Matter of Prudential Property and Casualty Insurance Company,* 133 AD2d 87 (2nd Dept. 1987); and *Avery v. Avery,* 81 AD2d 849 (2nd Dept. 1981).

The prior litigation determined by order dated June 20, 1988 dismissed the action of Plaintiff Sally Gross with prejudice and ordered the parties to arbitration as requested by Defendants Albert Ancona and Leon Ancona. There was no appeal from this order and no arbitration proceedings were held. This prior lawsuit involved the same issues as are contained in the counterclaims of Defendant Sally Gross. The Plaintiffs have raised the affirmative defense of collateral estoppel. Since Defendant Sally Gross, by her counterclaims, attempts to reintroduce the same issues, collateral estoppel

precludes relitigation and binds Defendant Sally Gross by the decision in the earlier action. *Schuykill Fuel Corp v B & C Nie berg Realty Coip,* 250 NY 304 (1929); Siegel, New **York Practice,** § 443 at page 673. "(W)here it can be fairly said that a party has had a full opportunity to litigate a particular issue, he cannot reasonably demand a second one." *Schwartz v Public Administrator,* 24 NY2d 65, 69 (1969). See also *Bonde v General Security Insurance Company of Canada, 55* Misc2d 588 (1967). The proof therefore, for the period from September 1, 1979 (when Arlington Mall Associates was created) to February 7, 1987 (when the prior action was commenced with respect to whether Albert Ancona and Leon Ancona had "committed gross negligence, fraud, dishonest and other improper conduct towards" Sally Gross with respect to the partnership, and any other improper, conspiratorial action or failure to act with respect to the partnership) is, therefore, precluded by collateral estoppel.

Arbitration is a contract right that can be waived. *Sherrill* 1.'. *Grayco Builders,* 64 NY2d 261 (1985). In the case at bar, the parties waived arbitration by consenting to the trial of these three actions.

In Action No. 3 above, the Plaintiffs, the Estates of Albert Ancona and Leon Ancona in their complaint, state as grounds for the dissolution the termination of the trust for Karen Rosenthal, and the "wrongful" assignment by Karen Rosenthal of her trust interest to Sally Gross. Neither grounds are sufficient under § 63 of the **Partnership Law.** When the trust terminated, Sally Gross continued as a partner, although she was no longer a trustee; and since Karen Rosenthal had no interest in the trust after February 1, 1989, her assignment of December 23, 1991 is of no legal effect. Moreover, there was no motion made to conform the pleadings to the proof in support of any other ground for dissolution. *Couch v. Langan* 63 NY2d 987 (1984). However, **CPRL** 3025 (c) provides that "the court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as

may be just ..." See New **York Practice,** Second Edition, David D. Siegel, § 404. Motion to Conform the Pleadings to the Proof, p.611.

Nevertheless, in this case where Defendant Sally Gross in her counterclaim calls on the equity powers of this court to act to grant dissolution of this partnership pursuant to § 63 of the **Partnership Law,** based upon the Defendant Sally Gross' violations of her fiduciary duties and her fraud, and where the parties have consented to consolidate these three actions for joint trial, and since this partnership is operating at a loss, *Landsman, Inc. v. Grant-Perridine~,* 169 AD2d 460 (1st Dept. 1991), this court will search the record for partnership breach of a fiduciary duty and fraud, and any other appropriate grounds for dissolution.

It is within the equitable power of th~e court, in its sound discretion, to grant dissolution to the Estates of Albert Ancona and Leon Ancona based upon the instances of breach of fiduciary duty tantamount to actual fraud by Sally Gross perpetrated upon her partners. In *Morris v. Morris,* 138 Misc. 680 (1930), *affd* 234 AD 187 (2d Dept. 1931), *affd. without opinion,* 260 NY 650 (1932), at p. 686 the trial court states:

> "... The principal contention of the defendants is that on the facts plaintiff is not entitled to invoke the aid of a court of equity and that consequently the court has no jurisdiction to hear and determine the subject-matter in controversy. In taking this position defendants evidently fail to note the important distinction between the general power inherent in a court of equity to decide a cause at all and the question whether it ought to assume jurisdiction. The propriety of affording equitable relief rests in the sound discretion of the court to be exercised according to the circumstances and exigencies of each particular case. Of course this discretion is not an arbitrary one, but must be exercised in accordance with the fixed principles and precedents

of equity jurisprudence. Under some circumstances judicial discretion to grant relief becomes judicial duty to grant it. The grace which equity should bestow then becomes a matter of right. The court frequently has, and exercises, a discretion either to retain jurisdiction and afford relief or to remit the parties to their remedy at law. (21 C. J. 34, 35.) Here the plaintiff has no adequate remedy at law. Therefore, the court should not decline to administer justice and enforce rights for which there is no other remedy.It is also urged that there is no authority for the maintenance of an action of this character. The absence of precedents, or novelty in incident, presents no obstacle to the exercise of the jurisdiction of a court of equity. It is the distinguishing feature of equity jurisprudence that it will apply settled rules to unusual conditions and mold its decrees so as to do equity between the parties. (21 C. J. 35) ..."

See also *St. Stephen's Ch. v. Ch. of Transfiguration,* 201 NY 1 (1911), p. 10; and *Valentine Gardens Cooperative, Inc. v. Oberman,* 237 NYS2d 535, 537 (1963).

At the same time, the court applies in this case, on behalf of Albert Ancona and Leon Ancona, the business judgment rule which provides that if a decision is made in good faith and without personal bias or conflict of interest, the fiduciary is not liable even if the decision turns out to be unwise or unsound. *Levine v. Levine,* 184 AD2d 53 (1st Dept. 1992).

The facts in this case show that during the operation of this partnership, Sally Gross breached her fiduciary duty by knowingly arranging for Leon Ancona to make a usurious loan to her to his financial detriment, and by knowingly commencing a fabricated, groundless action for breach of contract against Albert Ancona and Leon Ancona. Also, Sally Gross engaged in conduct tantamount to actual fraudulent concealment of partnership records, and even involved the

court in this activity by obtaining a discovery order to produce partnership records, some of which she had secreted.

In *Drucker v. Mige Associates,* 639 NYS2d 365 (1st Dept. 1996) a partner breached his fiduciary responsibilities in derailing the profitable conversion of the partnership's building into a cooperative apartment through his unwarranted demands that, if met, would have resulted in his receiving an amount of money in excess of what other partners were going to obtain and would have reduced the amount that would be left over for limited partners. In this case, the court removed the general partner without past, present, or future compensation.

In *Leibevic* V. *Bronstein,* 134 AD2d 891 (4th Dept. 1987), in affirming, the Appellate Division stated:

> "The record supports the court's finding that during operation of the partnership, Defendant engaged in conduct tantamount to fraudulent concealment and breach of fiduciary responsibilities. Such conduct would have warranted a dissolution. (See Partnership Law § 63 [1] [c], [d]."

See also *May v. Flowers,* 106 AD2d 873 (4th Dept. 1984), *app. dism.* 64 NY2d 611 *Pivot Punch* **&.** *Die Corp.,* 15 Misc2d 713, *mod* 9 AD2d 861 (4th Dept. 1960); and, *Gianuso v. Weis,* 195 NYS 279 (1925).

In this court's opinion, Defendant Sally Gross has been guilty of such conduct as tends to affect prejudicially, the carrying on of the business (§ 63(1.) (c)); Defendant Sally Gross so conducts herself in matters relating to the partnership business that it is not reasonably practicable to carry on the business with her (§ 63 (1) (d)). The business of the partnership can only be carried on at a loss under the present circumstances due to the conduct of Defendant Sally Gross(§ 63 (1) (e)); and

all the circumstances as described above, render such a decision equitable (§ **63**(1)(f)).

In virtue of the foregoing this court finds that by reason of her actions in connection with this partnership, Defendant Sally Gross has perpetrated actual fraud and dishonest conduct to the detriment of her partners Albert Ancona and Leon Ancona and is, therefore, liable to their estates for money damages.

Conversely, this court finds that Albert Ancona and Leon Ancona in virtue of their actions in connection with this partnership, have not committed actual fraud, gross negligence, or dishonest conduct, and are, therefore, not liable to Sally Gross for damages. (Paragraph 14A of Partnership Agreement.)

Under the counter claims alleged by Defendant Karen Rosenthal she has no standing to sue since she never had either a partnership interest or an assigned interest in the partnership.

When Albert Ancona, a party in two of the three above entitled consolidated actions, died on January 12, 1977 after the trial of this case but before this decision "the litigation grinds to a halt." **CPLR** § 1015, Practice Commentary, p. 54, pocket part. *Manhanaim Resort Corp. v Samples,* 156 AD2d 342 (Dept. 1989); § **1021 CPLR.** Siegel, **New York Practice, Chapter** 7, § 138, p. 206. The personal representatives having been appointed for the Estate of Albert estate, and this court having entered an Order of Substitution dated May 27, 1997, this court can proceed to decide this case.

This court authorizes Nellie Ancona Sachs, as Executrix of the Estate of Leon Ancona, decd., and Nancy J. Finer and David R. Ancona as Personal representatives of the Estate of Albert Ancona, decd. to wind-up the partnership and sell the realty and personal property of Arlington Mall Associates as soon as practicable, subject to the prior approval of the court.

This court directs that Sally Gross, her agents, servants, employees, and attorneys are not to participate in the management of the affairs of Arlington Mall Associates Partnership, nor write checks on any partnership account.

This court appoints Norman I. Siegel, Esq., of 258 Genesee Street, Utica, N.Y. 13502, an attorney admitted to practice before the courts of this state, as a referee to hear and report with respect to the manner, terms and procedures of the sale of the assets, and any other issues or questions which arise during the winding-up of the partnership. This court also appoints Norman I. Siegel as a referee to hear and determine the following: (1) to determine, prepare and file the final account of the Partnership; and (2) to determine damages. The referee is authorized to take testimony, subpoena witnesses, issue subpoena's duces tecum, and to require each party to submit proposed final accounts and to testify. This referee is to be compensated by the winding-up partners out of partnership assets at the rate of $150 per hour for time spent, and he is to be reimbursed for actual out-of-pocket expenses and disbursements. The referee is to be paid promptly as his statements (having been first delivered to the partners and then approved by the Court) are presented for payment.

This court of equity will retain jurisdiction in this case, not only to do justice, but also to avoid a multiplicity of suits. *AnsoniaAssoc. v. AnsoniaRes.*, 78 AD2d 211,216(1st Dept. 1980); *Hochen v. Rubin,* 24 AD2d 254 (1st Dept. 1965); and *Bouton v Van Buren,* 229 NY 17, 22 (1920).

Accordingly, it is,

ORDERED, that in the action of the Estate of Leon Ancona against Defendant Sally Gross, individually and as trustee of the Trust of Karen Rosenthal (Action No. 1), that a judgment be entered in favor of the Plaintiff Estate of Leon Ancona and

against Defendant Sally Gross, in the amount of $10,000 with interest from October 20, 1980 at 11% per annum to the date of entry ofjudgment less the amount of $1,059.60 interest already paid together with the costs of this action; and it is,

ORDERED, that in the action of Plaintiff Sally Gross against Defendants the Estates of Leon Ancona and Albert Ancona (Action No. 2), that a judgment be entered in favor of Defendants the Estates of Albert Ancona and Leon Ancona and against Plaintiff Sally Gross, finding no cause for action in favor of the Defendants, and awarding to the Defendants the costs of this action; and it is

ORDERED, adjudged, and decreed in the action by Plaintiffs the Estates of Albert Ancona and Leon Ancona vs. Defendants Sally Gross and Karen Rosenthal (Action No. 3) as follows:

(1) That the Plaintiffs Estates of Albert Ancona and Leon Ancona, request for declaratory judgment that Sally Gross is not a partner in Arlington Mall Associates is denied;

(2) That the dissolution of the Arlington Mall Associates Partnership pursuant to Section 63 of the **Partnership Law** is granted for the reasons above stated;

(3) That all counterclaims of the Defendants are dismissed; and specifically the counterclaims for damages based upon the alleged fraud, gross negligence and dishonesty of Albert Ancona and Leon Ancona are dismissed.

(4) That any claim against Defendant Karen Rosenthal is dismissed.

(5) That no costs are awarded in this action.

An Appendix is attached. This is the Decision, Order and Decree of this court.

ENTER.

DATE: June 10, 1997

s/ John T. Buckley
John T. Buckley
Justice of the Supreme Court

Submitted: June 4 1997

APPENDIX

A.The Trial

This trial was held on April 15, 16, and 18, and May 20 through 22, 1996. Twelve witnesses testified, namely: Donald A. Fisher, Edward A. Taylor, David J. Hardy, Robert A. Linaberry, Carmen D. Guinto, Thomas O'Bryan, Sally J. Gross, Harlan LaVine, Albert Ancona, John Shephard, Nellie Ancona Sachs, and George Weaver. There were 212 exhibits marked of which 182 exhibits were received in evidence. There are 1,210 pages of transcript of the trial.

B.Papers Received

1. Ancona Trial Memorandum dated April 11, 1996.

2. Gross Trial Memorandum dated April 11, 1996.

3. Ancona Motion to Dismiss Complaint dated and filed May 10, 1996, including the following supporting papers:
   a. Affidavit of David A. Kalabanka sworn to May 9, 1996;
   b. Affidavit of Thomas O'Bryan sworn to May 7, 1996;
   c. Affidavit of George Weaver sworn to May 6, 1996;
   d. Affidavit of Lester Sachs; and
   e. Memorandum of Law dated May 10, 1996.

4. Affidavit In Opposition to Motion to Dismiss of Sally J. Gross.

5. Attorney Affirmation of Marianne Brown, attorney for Defendant Karen Rosenthal dated June 6, 1996.

6. Gross Memorandum In Opposition To Motion To Dismiss dated June 6, 1996.

7. Ancona Conclusions of Law dated September 25, 1996.

8. Ancona Requests for Findings of Fact and Conclusions of Law dated September 25, 1996.

9. Gross Proposed Findings of Fact dated September 25, 1996.

10. Gross Proposed Conclusions of Law dated September 25, 1996.

11. Gross Post Trial Brief dated September 25, 1996.

12. Ancona Plaintiffs Response to Defendants Proposed Conclusions of Law dated October 25, 1996.

13. Ancona Response to Defendants Proposed Findings of Fact dated October 25, 1996.

14. Gross Reply Brief dated October 25, 1996.

15. Ancona Motion for Appointment of a Temporary Receiver dated October 31, 1996, including the following supporting papers:

a. Affidavit of Nellie Sachs sworn to October 18, 1996;
b. Affidavit of Thomas E. O'Bryan sworn to October 31, 1996.

16. Affidavit in Opposition to Motion to Appoint Temporary Receiver of Sally Gross sworn to November 7, 1996.

17. Affidavit in Opposition to Motion to Appoint Temporary Receiver of Richard L. Weisz sworn to November 7, 1996.

18. Memo dated May 7, 1997 from Tom O'Bryan advising Albert Ancona's date of death is January 12, 1997 and enclosing certified copy of Letters of Administration appointing Nancy J. Finer and David R. Ancona Personal representatives of the Estate of Albert
Ancona, decd.

19. Memo dated May 23, 1997 from Tom O'Bryan enclosing Stipulation of Attorneys and of Personal Representatives substituting Personal Representatives of the Estate of Albert Ancona as parties to actions No. 2 and No. 3 and continuing the Sugarman Law Office in these actions as attorneys for the Estate.
20. Affidavit, Reply (Ancona : June 3, 1997).
21. Letter (Gross : June 5, 1997)

Order of Judge Nicholas V. Midey, Jr., Court of Claims.

State of New York
Court of Claims

SALLY J. GROSS,

Claimant,

-v-

THE STATE OF NEW YORK,

Defendant.

DECISION
AND ORDER

Claim No.-None
Motion No. - M-70368

BEFORE:
HON. NICHOLAS V. MIDEY JR.
Judge of the court of Claims.

APPEARRANCES:
For Claimant:
SALLY J. GROSS, *Pro Se*

For Defendant:
HON. ELIOT SPITZER
Attorney General
BY: Roger B. Williams, Esq.
Assistant Attorney General
of Counsel.

RECEIVED
NYS OFFICE OF THE

MAR 28 2006

ATTORNEY GENERAL
LITIGATION BEAREAU

FILED
MAR 28 2006
State Court of
Claims
Albany NY

Claimant has brought this motion seeking permission to serve and file a late claim. The following papers were considered by the court in connection with this motion:

Notice of Motion, Affidavit of Claimant, Proposed Claim, With Exhibits 1, 2, 3

Claim No. NONE, Motion No. M-70368

Affirmation In Opposition, Memorandum of Law 4, 5

Rebuttal, with Exhibits, Memorandum of Law,
with Exhibits 6, 7

In her proposed claim, claimant seeks damages of four million dollars ($4,000,000.00) based upon the alleged "unlawful conduct of a state employee" (see Item 3, Proposed Claim, par. 2). Specifically, the alleged unlawful conduct refers to actions taken by New York State Supreme Court Justice John T. Buckley, who presided over a lawsuit in 1997 involving claimant and the Estates of her business partners, Leon Ancona and Albert Ancona.

In a decision filed with the Onondaga County Clerk on July 27, 1997, Justice Buckley found in favor of the Estates of Leon Ancona and Albert Ancona in three consolidated actions, following a non-jury (see Exhibit D to Items 1, 2, 3).

Claimant appealed, and his decision was unanimously affirmed by the Appellate Division, Fourth Department in 1998 (Sachs v Gross, 256 AD2d 1114).

According to claimant's submissions, she also attended a "settlement hearing" on July 2, 1999, resulting in her acceptance of a "small settlement", which apparently led to the dismissal of claimant's application seeking leave to appeal to the Court of Appeals.

In her proposed claim and other submissions, claimant contends that Justice Buckley was a friend of the husband of the executrix in the Estate of Leon Ancona, and that "each and every decision the prevailing Judge made... was

proof he decided to give her peer all the benefits of this case" (see Item 3, Proposed Claim, par. 2). Claimant alleges that Justice Buckley illegally distributed settlement funds, and that this is "new information" supporting her application for late claim relief.

In most situations, in order to determine an application for permission to serve and file a late claim, the Court must consider, among other relevant factors, the six factors set forth in § 10(6) of the Court of Claims Act. The factors set fourth therein are: (1) whether the delay in filing the claim was excusable; (2) whether the State had noticed of the essential facts constituting the claim; (3) whether the State had an opportunity to investigate the circumstances underlying the claim; (4) whether the claim appears meritorious: (5) whether substantial prejudice resulted from the failure to timely file and the failure to serve upon the Attorney General a timely claim or notice of intention to file a claim: and (6) whether any other remedy is available. The Court is afforded considerable discretion in determining whether to permit the late filing of a claim (see, Matter of Gavigan v State of New York, 176 AD2d 1117).

In the submission before the Court on this application, however, both parties have focused their attention primarily on the issue as to whether claimant has asserted a meritorious claim, and have made only passing reference, if any, to the other statutory factors set forth in § 10(6). Accordingly, this Court will first address the factor, because if the proposed claim lacks any apparent meri, it would be an exercise in futility to grant the application (Savino v State of New York, 199 AD2d 254: Prusack v State of New York, 117 AD2d 729).

Claim No. NONE, Motion No. M-70368

In this application, claimant has submitted with her motion a copy of Justice Buckley's decision (see Exhibit D to Items 1,2,3) as well as a 31 page document (with Exhibits) titled "Disproving Judge Buckley's Decision" (see Exhibit C to Items 1,2,3). In this document, claimant contends that Justice Buckley was biased against claimant, and failed to consider the weight of the evidence in rendering his decision. Additionally and previously stated herein, claimant contends that she uncovered new information that Justice Buckley had illegally authorized distribution of funds which were the subject of the lawsuit.

No matter how this claim is characterized by claimant, the crux of the claim is her dissatisfaction with the decision made by the Justice Buckley in 1997. The Court notes, as evidenced by the submissions, that claimant was represented by the counsel throughout the proceeding before Justice Buckley, as well as during her appeal of his decision, which unanimously affirmed by the appellate Division, Fourth Department.

Even though the State has waived immunity from liability and has conferred jurisdiction upon the Court of Claims to entertain claims for damages caused by "torts of its officers or employees while acting as such officers or employees" (Court of Claims Act § 9), it is well settled that actions taken by a State-employed judge are cloaked with absolute judicial immunity (see Swain v State of New York, 294 AD2d 956; Weiner v State of New York, 273 AD2d 95; Welch v State of New York, 203AD2d 80; Harley v State of New York, 186 AD2d 324). The concept of judicial immunity exempts judges from liability for all acts done in the exercise of their judicial function (Murray v Brancato, 290 NY 52). The doctrine of judicial immunity is extremely broad, and extends to virtually all

actions taken and decisions made in the performance of judicial functions. It is important to note that the doctrine of absolute judicial immunity is not overcome even by allegations of bad faith or malice (Wood v Incorporated Village of Patchogue of New York, 311 F Supp 2d 344; see Mireles v Waco, 502 US 9).

In this application, it is abundantly clear that claimant seeks permission to file a claim based upon actions taken by Justice Buckley within the context of his judicial function, and under these circumstances, the doctrine of judicial immunity shields the State from any liability to the claimant for such actions.

In sum, the Court of Claims is not the proper forum to address claimant's dissatisfaction with the determination made by Justice Buckley in Supreme Court, or any actions taken by Justice Buckley related to that judicial proceeding.

Based on the foregoing, the Court finds that claimant has failed to establish any apparent merit to her proposed claim. Since the doctrine of judicial immunity precludes any possibility of relief to claimant, it would be futile to permit the filing of this claim (see Savino v State of New York, supra; Prusack v State of New York, supra). Accordingly, claimant's application must be denied.

Therefore, it is
ORDERED, that Motion No. M-70368 is hereby DENIED

Syracuse, New York
March 21, 2006

s/ Nicholas V. Midey Jr
NICHOLAS V. MIDEY JR
Judge of the court of claims

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Gross v State of New York
2007 NY Slip Op 00775
Decided on February 2, 2007
Appellate Division, Fourth Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431
This opinion is uncorrected and subject to revision before publication in the Official Reports

Decided on February 2, 2007

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: GORSKI, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

39 CA 06-01336

[*1] SALLY J. GROSS, CLAIMANT-APPELLANT,

v

STATE OF NEW YORK, DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Nicholas V. Midey, Jr., J.), entered March 28, 2006. The order denied claimant's motion for permission to serve and file a late claim.

SALLEY J. GROSS, CLAIMANT-APPELLANT PRO SE.
ELIOT SPITZER, ATTORNEY GERNERAL, ALBANY (MICHAEL S. BUSKUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

It is hereby ORDERED that the order so appealed from and the same hereby is unanimously affirmed without costs for reasons stated in decision at the Court of Claims (*Gross v State of New York*, 11 Misc 3d 1084 [A], 2006 NY Slip Op 50702 [U]).

Entered: February 2, 2007
JoAnn M. Wahl
Clerk of the Court

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany On the first day of May 2007

Present, HON. JUDITH S. KAYE, Chief Judge, presiding

4-10 Mo. No. 353
Sally J. Gross,
Appellant,

v.
State of New York,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same heeby is denied with one hundred dollars costs and necessary reproduction disbusements.
Judge Pigott took no part.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

- - - - - - - - - - - - - - - - -

4-10 Mo. No. 353
Sally J. Gross

Appellant,

v.

State of New York,

Respondent.

- - - - - - - - - -

ORDER

- - - - - - - - - -

ENTERED May 01, 2007